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No. 91-600

IN THE

Supreme Court of the United States

October Term, 1991

AUSTIN L. EVANS,
Petitioner,

vs.

HENRY L. GOODMAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether in the absence of direct evidence of racial discrimination, the plaintiff in an individual reverse discrimination action may be required, as part of his presumptive *prima facie* case, to establish that background circumstances support the suspicion that the defendant is the unusual employer who discriminates against the majority.

II. Whether the courts below correctly held that a state university professor who unsuccessfully sought promotion to the rank of Associate Professor of Mechanical Engineering, with tenure, in the College of Engineering, had failed to establish a case of disparate treatment under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution by using as comparables a candidate for tenure in the Department of Specialized Instructional Programs, College of Education, and a candidate for hire as an untenured Visiting Professor of Civil Engineering, College of Engineering.

III. Whether a university professor can maintain a claim for the alleged deprivation of his equal protection rights by a state university in the denial of promotion with tenure when the alleged deprivation is not premised on racial, ethnic or other class animus but on a qualitative consideration of academic scholarship.

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STATEMENT OF THE CASE

Petitioner is an American-born, white male who unsuccessfully sought a promotion to the rank of Associate Professor with tenure in the Department of Mechanical Engineering, Fenn College of Engineering (the "College"), Cleveland State University (the "University") in January, 1988. Respondents are the nine members of the University's Board of Trustees, the six members of the Faculty Affairs Committee, the eight members of the University Personnel Committee, the President and former Provost, the former President, the Interim Vice President for Academic Affairs, the Dean of the College of Engineering and an Associate Professor in the Mechanical Engineering Department.

Petitioner claims that he was discriminated against on the basis of his race because (1) on the same day he was denied his request for promotion with tenure, the University granted tenure to Janice Hale-Benson ("Hale-Benson"), a black female who was then an untenured Associate Professor in the Department of Specialized Instructional Programs, College of Education; and (2) several months after his request was denied, the Department of Civil Engineering hired Joseph Akinmusuru ("Akinmusuru"), a black, as a Visiting Associate Professor without tenure. Petitioner also claims that he was denied promotion with tenure on the basis of non-class-related animus against him because in January, 1988 and in January, 1986 other white males in the College with allegedly similar scholarly records had obtained tenure/promotion. The main issue in Petitioner's request for promotion to Associate Professor with tenure had been his scholarship, as evidenced by his publication record.

After discovery was completed, Petitioner's claims were dismissed by the trial Court on Respondents' Motion for Summary Judgment. With respect to the reverse discrimination claims, the trial Court ruled that since Respondents had successfully articulated a legitimate, nondiscriminatory reason for the denial of promotion with tenure, it would not rule on whether Petitioner had established a *prima facie* case of reverse discrimination but would assume that he did (R. 71: Memorandum of Opinion at 15 fn. 16). The trial Court further found that Petitioner had failed to meet his burden of proof on the issue of "pretext" because he did not show that a discriminatory reason more likely motivated the decision at issue and because the comparisons to Hale-Benson and Akinmusuru were inappropriate as the facts involving these two individuals were dissimilar (*Id.* at 15-18). The trial Court also ruled that Petitioner's other claim of unequal treatment in the consideration of his scholarly record was not justiciable under the Equal Protection Clause because it did not involve class-based discrimination. The trial Court declined to serve as a "super-tenure review committee", noting that academic determinations require discretionary judgments by professional experts on elusive and intangible academic qualities and talents which courts are not qualified to review (*Id.* at 18-19). In total agreement with the trial Court, the U.S. Court of Appeals for the Sixth Circuit affirmed.

The facts at issue in this case are straightforward. Petitioner was hired by the University in the Department of Mechanical Engineering in January, 1982 while he was still completing the requirements for a Ph.D. at the University of Tennessee. Upon completion of the Ph.D. requirements, he was promoted to Assistant Professor and, pursuant to the University's policies, was

given a tenure date. He first applied for promotion to the rank of Associate Professor with tenure in the Fall of 1986 and did not obtain it. Due to a potential conflict of interest by one of the individuals involved in the process, the Provost expunged that application and gave Petitioner an opportunity for a *de novo* consideration of his request in the following academic year, thus extending his tenure date by one year.

Petitioner's Fall 1987 request for promotion to Associate Professor with tenure was supported, by a vote of 5 in favor and one against, by the College Personnel Action Committee ("PAC"), the first academic committee charged by University policies with the review of candidates for promotion and tenure. The Chair of his Department and the Dean of the College supported Petitioner's request for promotion, and, pursuant to University policies, sent their recommendations to the Provost. Because the Provost had concerns about the nature and quality of Petitioner's research and scholarship, particularly publication, the Provost, as provided for in the University's policies, referred his request for promotion to the University Personnel Committee ("UPC") for its advice. The UPC consists of eight tenured faculty members elected by the faculty and is the most prestigious academic committee on campus. The UPC, by a vote of 5 to 3, recommended that Petitioner's request for promotion and tenure be denied. The Provost agreed with the UPC's recommendations. After the Provost and the President discussed Petitioner's request, the President did not recommend Petitioner's promotion to the Board of Trustees.

Under the University's policies, Petitioner appealed the denial of his request for promotion with tenure to the Faculty Affairs Committee ("FAC"). This Committee, composed of six faculty members elected by the

members of the Faculty Council, reviewed his dossier, obtained additional information, held a hearing on March 7, 1988 and discussed the case in executive session on five occasions. As a result of this considerable investigation and review, the FAC found that Petitioner had failed to establish that the denial of his application for promotion and tenure was improper.

All the individuals who were involved in this process are white.

The main issue in Petitioner's request for promotion was the nature and quality of his research and scholarship. Of the 21 publications listed in his request for promotion, 5 were published prior to his employment with the University, while he still had not completed his doctorate. Of the remaining 16 publications, only 5 were refereed. The others were conference proceedings, internal National Aeronautics and Space Administration ("NASA") reports and Battelle monthly technical progress reports. These types of publications are not the equivalent of publishing in refereed journals. A number of the publications were also co-authored. Moreover, the NASA and Battelle reports are not for general release. Both the Provost and the UPC were hesitant to credit that confidential research given the fact that confidentiality is not part of the open scientific interchange which characterizes academic scholarship and critical evaluation.

In addition, Petitioner's research has essentially been "applied" research, as opposed to fundamental (theoretical) research. Fundamental research in engineering develops a theory mathematically to arrive at a certain equation. Applied research takes an equation and converts it into the design of, for example, a piece of equipment. Traditionally, universities have been

exclusively concerned with fundamental (theoretical) research and it is only within the last five years that *some* universities have been accepting applied research as a legitimate scholarship area, *for limited purposes.* There is a controversy on the issue in academic circles and even the few universities that accept applied research would not accept it for promotions beyond the Associate Professor level. While the then Dean of the College is receptive to the idea that applied research has a place in academia, his view is not shared by others at the University, nor is it shared by the majority of American universities. One of the problems in applied research is that there are very few journals where it can be published. It is then difficult for others to evaluate the research. The Dean had indicated to Petitioner the academic concerns and limitations about applied research. Petitioner nevertheless chose to pursue the applied research path.

Contrary to Petitioner's suggestion, it was not improper for the Provost to refer this matter to the UPC. By University policy, the Provost had the authority to refer Petitioner's request for promotion to the UPC for its advice even though the College PAC, the Chair of his Department and the Dean of the College favored the promotion. The tenure process is a peer review process with "checks and balances" built into it and the UPC is one of those checks and balances. This group of respected elected tenured faculty members representing the different colleges and the different goals of a pluralistic university does assist the Provost in difficult decisions. In order to do so, the UPC solicits information *from the candidate* and reaches an independent conclusion. The UPC, being further removed from the immediate colleagues in a department or college, can provide a valuable peer evaluation, at arm's length.

In sum, Petitioner's research activities were viewed differently by different individuals involved in the peer evaluation process. Although there is room for disagreement in academic peer evaluations, the system ultimately operates by consensus. Petitioner failed to convince a substantial majority of tenured faculty that he possessed the level of scholarship required for promotion to the rank of Associate Professor with tenure.

Although Petitioner would have received a terminal contract for academic year 1988-1989 and, in accord with University policies, could have reapplied for promotion again in the Fall of 1988, he resigned at the end of the 1987-1988 academic year after securing employment with NASA Lewis Research Center in Cleveland, Ohio.

There were three other candidates for promotion to Associate Professor with tenure in the College in academic year 1987-1988. Two are white and one is Asian. All were promoted. The previous year there had been two candidates, one white and one Asian, and both were promoted to Associate Professor with tenure. In addition, three individuals who were initially hired as untenured Associate Professors in the College were considered for tenure during academic year 1987-1988 and all obtained tenure. All are white males.

At the time of Petitioner's employment, there were no black faculty members in his College. The faculty in the College consisted of approximately forty-three white males, eleven Asian/Pacific males and one Asian female. Akinmusuru, whom Petitioner attempted to use as a comparable, was hired as a Visiting Associate Professor in the Civil Engineering Department in academic year 1988-1989. He became an Associate Professor *without tenure* in the same department the following academic

year and his tenure date is January 15, 1992. In order to obtain tenure in 1992 Akinmusuru must undergo the same process as Petitioner. Akinmusuru did not apply for a position at the University until after Petitioner's request for promotion had been denied. He had been originally interviewed for a position in the department which was initially offered to *another* candidate, *a white male* who declined the position. Akinmusuru had obtained his Ph.D. in 1978, had taught Civil Engineering at the University of Ife (Nigeria) from October 1973 to September, 1987 and was a Visiting Professor in the Department of Civil Engineering at the University of Michigan during academic year 1987-1988. At the time of hire by the University he had published 18 articles and had submitted another 5 for publication. Neither Respondents UPC members nor Respondents FAC members participated in the decision to hire Akinmusuru.

University-wide, ten whites, one black and one Asian were promoted to Associate Professor with tenure during academic year 1987-1988. Three whites and one Asian were denied promotion to that rank with tenure. Of eight individuals University-wide who sought tenure only during the same academic year six whites and one black received tenure. One white individual was denied tenure.

During academic year 1987-1988 there were approximately 535 full-time faculty members at the University, which is an urban university located in the downtown area of the City of Cleveland. Of the 535 faculty members, 21 are black. The number of black faculty members in 1989 was 27.

There is no allegation that the University's standards for promotion and tenure make distinctions on the basis of race. There is no allegation that the

University's standards for promotion and tenure contain racial "quotas", "set asides" or numerical "preferences". Because, at all relevant times, the University has been considered by the federal government to be a government contractor subject to Executive Order 11246, the University is required by law to have affirmative action compliance programs. The University is also subject to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e *et seq.* ("Title VII") and, as such, has to provide equal employment opportunity. Thus, the fact that the University and Respondents are committed to equal employment opportunity and affirmative action programs is not, as Petitioner suggests, indicia of reverse discrimination. The record in this case shows that the actions Petitioner adduces as indicia of reverse discrimination are nothing but actions mandated by the law of the land. Moreover, simple logic dictates that affirmative efforts to reach minorities as a public policy does not necessarily constitute evidence of bias in a particular case involving the individual academic qualifications of a person who belongs to the majority. And, most significantly, Petitioner has never shown a causal relationship between the University's equal employment opportunity and affirmative action obligations and the denial of his request for promotions and tenure. The trial Court specifically so found (R. 71: Memorandum of Opinion at 16).

Petitioner also attempted to use a black female, Hale-Benson, as an alleged comparable even though she was not similarly situated. Hale-Benson had joined the Department of Specialized Instructional Programs, College of Education, in the fall of 1984 as an *untenured* Associate Professor and Coordinator of Early Childhood Programs. She had received her Ph.D. in Early Childhood Education from the Georgia State University

in 1974. From 1974 until 1979 she was an Assistant Professor in Early Childhood Education at Clark College in Atlanta. In 1979, she was promoted by Clark College to Associate Professor. While at Clark College, Hale-Benson also served as Research Associate in the Department of Psychology at Yale University (1979-1981) and as a Lecturer in the Afro-American Studies Program, also at Yale University.

In 1981, Hale-Benson became an Associate Professor of Early Childhood Education at Jackson State University in Mississippi. While at Jackson State, she was also a Research Affiliate, Psychology Department, at Yale University (1981-1983). Prior to her employment with the University, Hale-Benson had authored a nationally recognized book entitled "Black Children: Their roots, culture and learning styles" (1982) and had published two articles in refereed journals. She had also published a variety of articles in non-refereed journals.

Since Hale-Benson was hired by the University as an untenured Associate Professor and had more than one year of full-time college teaching experience, she had three years in which to obtain tenure under the University's policies. She submitted her request for tenure in the Fall of 1986 and her request was denied because of a concern about Hale-Benson's teaching, leadership in the Early Childhood Program for which she was coordinator and service in the Department, College and University. *Hale-Benson's publication record was not an issue.*

After Hale-Benson was denied tenure, her attorney made public charges of racism against the University and there was considerable publicity in the local newspapers pertaining to Hale-Benson, whose research and publication record in her area of expertise is nationally recognized. The record shows that the

contacts between Hale-Benson's attorneys and the University were exclusively limited to correspondence in late 1986 and early 1987 as to Hale-Benson's internal appeal rights in connection with her first request for tenure.

Hale-Benson applied for tenure again in the Fall of 1987. This time, the College of Education PAC and the Chair of her Department recommended against tenure but the recently appointed new Dean of the College of Education recommended that tenure be granted. Because the recommendations were conflicting, the Provost was obligated to refer the matter to the UPC and the UPC, by a vote of 6 to 1 and one absentee, recommended that tenure be granted. The Provost agreed with the UPC and the President then recommended the award of tenure to the Board of Trustees and tenure was granted, effective September 1, 1988.

Because the College of Education PAC had not supported Hale-Benson's request for tenure, the President was obligated by University policy to send a memorandum to the faculty of the College of Education describing his reasons for the recommendation in favor of Hale-Benson. In his memorandum, he explained that Hale-Benson's proven scholarship was reviewed *prior* to the decision to hire her as an Associate Professor and subsequent to her appointment at the University she had published a revised edition of her book which had been reviewed in major journals and was hotly debated in the academic community. The concerns about her teaching, program development and service expressed by all evaluators in 1986 and by some evaluators in 1987 were taken into account by those who supported her in 1987, but the Dean, the Provost and the UPC were satisfied that substantial improvement had taken place in her teaching and she was a fully competent teacher. The

President specifically found that he had "no basis on the evidence presented to challenge her teaching competence". The President also noted that her department had recently accepted her draft master's proposal for the Early Childhood Program, the absence of which had been a critical factor in the denial of tenure the prior year. In addition, Hale-Benson's funded research program, which involved the actual operation of a pre-school, was an asset to the department and community. The grants she had obtained had brought about half million dollars in funds. In summary, the reasons for the denial of tenure in 1986 no longer held true in 1987.

Petitioner has never offered a rational explanation as to how the fact that Hale-Benson had been represented by counsel in connection with the denial of her first request for tenure affected Petitoner's request for promotion and tenure. Nor has he offered a rational explanation as to how the accusations of racism at the University reported in the local newspapers affected the consideration of Petitioner's request for promotion and tenure. Similarly, Petitioner has never offered a rational explanation for the relationship between the denial of a promotion to a professor in the College of Engineering and the action taken by the City Council to vacate streets for a convocation center for the University. Moreover, the alleged conspiracy between the twenty-eight Respondents and the twenty-one member Council of the City of Cleveland is a conjecture of Petitioner that has never been proven and has never been rationally connected to the actual consideration of Petitioner's academic qualifications by his academic peers.

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit Rule Requiring Proof Of Background Circumstances Supporting The Suspicion That The Defendant Is The Unusual Employer Who Discriminates Against The Majority Applies Exclusively To The *Prima Facie* Case Of The Individual Plaintiff Who Alleges Reverse Discrimination Without Direct Evidence Of Racial Discrimination. Since Both The Trial Court And The Sixth Circuit Gave Petitioner The Benefit Of Assuming That A *Prima Facie* Case Of Reverse Discrimination Had Been Established, The First Question Presented By Plaintiff Is Not At Issue In This Case. Moreover, The Sixth Circuit Rule Is Consistent With Prior Rulings Of This Court.

In his argument in support of the first question presented for review, Petitioner concedes that "the Sixth Circuit's explicit holding on petitioner's racial discrimination claim involves another issue" (Petition for Writ of Certiorari at 28). Given the fact that both the trial Court and the Sixth Circuit gave Petitioner the benefit of the doubt in connection with the *prima facie* stage of his case and the rule Petitioner now challenges addresses only the *prima facie* stage of a reverse discrimination case, the first question presented for review has no bearing on this case. Moreover, there is no inconsistency between the Sixth Circuit's *prima facie* case rule and the decisions of this Court.

In *Murray v. Thistledown Racing Club, Inc.*, 770 F.2d 63, 67 (6th Cir. 1985), the Sixth Circuit Court of Appeals held that a reverse discrimination plaintiff bears the burden of demonstrating that he was intentionally discriminated against despite his majority status. Under *Murray*, the individual plaintiff who alleges reverse discrimination without direct evidence of racial discrimination must establish as part of his *prima facie* case that (a) "background

circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority" and (b) the employee was treated differently than other similarly situated employees of a minority race. *Id. Accord: Lanphear v. Prokop*, 703 F.2d 1311, 1315 (D.C. Cir. 1983); *Bishopp v. District of Columbia*, 788 F.2d 781 (D.C. Cir. 1986); *Parker v. Baltimore & Ohio Railroad Co.*, 652 F.2d 1012, 1017 (D.C. Cir. 1981); *DeMarco v. Thomas*, 47 CCH E.P.D. ¶38,150 (D.D.C. 1988); *Livingston v. Roadway Express, Inc.*, 802 F.2d 1250, 1252 (10th Cir. 1986); and *Flaig v. Bendix Corp.*, 488 F. Supp. 336 (E.D. Mich. 1980), *aff'd without op.*, 701 F.2d 177 (6th Cir. 1982).

The rationale for this burden was explained by the Court in *Lanphear, supra*:

> "Title VII prohibits discrimination against white males upon the same standards that it prohibits discrimination against members of a racial minority. In other words, a plaintiff's ultimate burden of persuasion remains the same regardless of race: he must prove that the defendant intentionally discriminated against him. Yet this court has recognized that some adjustment is necessary in the *prima facie* case required of a white male.
>
> > The original McDonnell Douglas standard required the plaintiff to show 'that he belongs to a racial minority.' *Membership in a socially disfavored group was the assumption on which the entire McDonnell Douglas analysis was predicated, for only in that context can it be stated as a general rule that the 'light of common experience' would lend a factfinder to infer discriminatory motive from the unexplained hiring of an outsider rather than a group member. Whites are also a protected group under Title VII, but it defies common sense to suggest that the promotion of a black employee justifies an inference of prejudice against white co-workers in our present society.*

> Thus, to establish a prima facie case appellant needs to show more than that he was qualified for the CAO position but was rejected in favor of a black male from outside MSPB. He must also show that 'background circumstances support the suspicion that the defendant is that unusual employer who discriminates against the majority.' In other words, to repeat the *Burdine* formulation, he must show that he 'was rejected under circumstances which [despite his majority status] give rise to an inference of unlawful discrimination.' " 703 F.2d at 1314-1315 (Emphasis added) (Footnotes omitted).

Once a *prima facie* case of reverse discrimination is established under *Murray*, the Sixth Circuit analysis follows the "articulation" and "pretext" analysis mandated by this Court for disparate treatment cases. That is, if the plaintiff establishes a *prima facie* case of reverse discrimination, the burden then shifts to the employer to articulate, not prove, a legitimate, nondiscriminatory reason for its actions. The ultimate burden of showing that the proffered reason is a pretext and of proving discrimination in reverse discrimination actions rests with the plaintiff. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 57 L. Ed. 2d 957, 98 S. Ct. 2943 (1978); *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 58 L. Ed. 2d 216, 99 S. Ct. 295 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981); *U. S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 75 L. Ed. 2d 403, 103 S. Ct. 1478 (1983); and *Farber v. Massillon Board of Education*, 917 F.2d 1391, 1398 (6th Cir. 1990), *cert. den.*, 111 S. Ct. 2851 (1991).

In the instant case, the trial Court, following *Aikens, supra*, ruled that because Respondents had articulated a legitimate, nondiscriminatory reason it "need not

determine whether [Petitioner] established a *prima facie* case of tenure discrimination based on race . . ." (R. 71: Memorandum of Opinion at 15 fn. 16). The trial Court only referred to *Murray, supra*, as a general reference in a footnote (*Id.*). The Sixth Circuit referred to *Murray* in describing the analytical framework applicable to individual reverse discrimination cases, but it also gave Petitioner the benefit of the doubt and assumed that Petitioner had made a *prima facie* case (June 3, 1991 Order at 6-7). The rule challenged by Petitioner, thus, has no bearing on this case.

Contrary to Petitioner's contentions, there is absolutely no conflict between the *Murray* rule and this Court's decisions in *McDonald v. Sante Fe Trail Transp. Co.*, 427 U.S. 273, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976), and *Village of Arlington Heights v. Metropolitan Housing Dev. Co.*, 429 U.S. 252, 50 L. Ed. 2d 450, 97 S. Ct. 555 (1977). The footnote in *McDonald* upon which Petitioner relies stands for the proposition that Title VII also prohibits discrimination against members of groups that historically have not been treated in a discriminatory manner. *McDonald* sanctions reverse discrimination actions under Title VII but does not establish the method and order of proof applicable to such actions. Similarly, the footnote in *Village of Arlington Heights* upon which Petitioner relies does not address the elements of a *prima facie* case in a reverse discrimination action when the plaintiff has no direct evidence of racial discrimination. Indeed, *Village of Arlington Heights*, which involved alleged discrimination against *minority* groups, recognizes that in cases of racial discrimination brought under the Equal Protection Clause the issue of determining whether race was a "motivating factor" in the challenged decision "demands a sensitive inquiry into such circumstantial and direct

evidence of intent as may be available." *Id.* Among the particularly relevant evidentiary sources on that issue, this Court referred to the "historical background of the decision". *Id.* at 267. This principle is embodied in the *Murray, supra,* test adopted by the Sixth Circuit.

Moreover, in the precise footnote in *Village of Arlington Heights* upon which Petitioner relies, this Court specifically referred to the importance of "comparable decisions" in determining the existence *vel non* of racial determination. This is precisely what the courts below emphasized in finding that the reasons articulated by Respondents were legitimate, nondiscriminatory academic reasons for the denial of promotion to Associate Professor with tenure and that Petitioner had failed to show that such reasons were pretextual.

As the *Murray* issue has no bearing on the ultimate outcome of this case, the Petition for a Writ of Certiorari on this issue should be denied.

II. The Courts Below Correctly Held That In Order To Determine Whether The Denial Of A Request For Promotion With Tenure In The Mechanical Engineering Department In The College Of Engineering Was Racially Motivated It Was Improper To Use As Comparables A Candidate For Tenure In The Department Of Specialized Instructional Programs In The College Of Education And A Candidate For Hire As An Untenured Visiting Professor Of Civil Engineering In The College Of Engineering.

Contrary to Petitioner's claim, the rule on the applicable comparables in academic promotion and tenure cases is neither arbitrary nor does it carve out unwarranted exceptions for academic decisions. Rather, this rule embodies common sense, plain logic and due deference to academic judgments over elusive and intangible scholarly matters which are not easily quantified.

Because tenure and promotion decisions in an academic setting involve a combination of factors which tend to set them apart from employment decisions generally, federal courts have consistently deferred to the expertise of educational administrators in evaluating the factors which should be taken into account in academic promotions and tenure. *See e.g., Zahorik v. Cornell University,* 729 F.2d 85, 92 (2nd Cir. 1984); *Lieberman v. Gant,* 630 F.2d 60, 64 (2nd Cir. 1980); and *Keyes v. Lenoir Rhyne College,* 552 F.2d 579 (4th Cir.), *cert. denied.,* 434 U.S. 904 (1977). The Equal Protection Clause "does not require 'mathematical perfection' in distinctions between tenure candidates, and 'the mere assertion of such a constitutional claim does not convert the federal procedure into a plenary administrative review.' ". *Levi v. University of Texas,* 840 F.2d 277, 280 (5th Cir. 1988); *Faro v. New York University,* 502 F.2d

1229, 1232 (2nd Cir. 1974); and *Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979). As recently stated by this Court in *University of Pennsylvania v. EEOC*, 493 U.S. 182, 107 L. Ed. 2d 571, 588, 110 S. Ct. 577 (1990):

> "This Court itself has cautioned that 'judges . . . asked to review the substance of a genuinely academic decision . . . should show great respect for the faculty's professional judgment.' *Regents of University of Michigan v. Ewing*, 474 U.S. 214, 225 (1985)."

The unique factors in the tenure process were enumerated by the Court in *Zahorik, supra;* (1) tenure contracts entail commitments both as to length of time (lifetime) and collegiate relationships (department or college for life) which are unusual; (2) tenure decisions are most often non-competitive; (3) university tenure decisions are usually highly decentralized through peer review; (4) the evaluation is quite extensive as it takes into account departmental needs, the individual's skills in multiple areas, peer and outside reviewers, and university-wide needs; and (5) tenure decisions are a source of unusually great disagreement. 729 F.2d at 92-93. The reasons for the usual disagreement are multiple:

> "Because the stakes are high, the number of relevant variables is great and there is no common unit of measure by which to judge scholarship, the dispersion of strongly held views is greater in the case of tenure decisions than with employment decisions generally. As the present record amply demonstrates, arguments pro and con are framed in largely conclusory terms which lend themselves to exaggeration, particularly since the stauncher advocates on each side may anticipate and match an expected escalation of rhetoric by their opponents. Moreover, disagreements as to individuals may reflect long standing and heated disputes as to the merits of contending schools of thought or as to the

needs of a particular department. The dispersion of views occurs within departments themselves but is accentuated by the solicitation of opinion from students, faculty from other departments and faculty from other universities. Where a broad spectrum of views is sought and the candidate suggests certain persons as referrants, a file composed of irreconcilable evaluations is not unusual." 729 F.2d at 93.

Since the decisions taken with respect to the similarly situated candidates for promotion to Associate Professor with tenure in Petitioner's College overwhelmingly refute his claims of reverse race discrimination, Petitioner sought to compare himself with Hale-Benson, a black female in the Department of Specialized Instructional Programs in the College of Education who successfully sought tenure in academic year 1987-1988. The courts below ruled that, as a matter of law, this comparison was inappropriate. This conclusion is consistent with the well-developed principle that, in the university setting, the plaintiff must use comparables within his department or, possibly, his College. *See e.g., Zahorik, supra*, 729 F.2d at 93-94; *Smith v. University of North Carolina*, 18 FEP Cases 913 at 916-17, 922 (M.D.N.C. 1978), *aff'd*, 632 F.2d 316 (4th Cir. 1980); *Langland v. Vanderbilt University*, 589 F. Supp. 995, 1011 (M.D. Tenn. 1984), *aff'd without op.*, 772 F.2d 907 (6th Cir. 1985); *U. S. v. University of Maryland*, 438 F. Supp. 742 at 756 (D.Md. 1977); and *Jackson v. Harvard University*, 721 F. Supp. 1397, 1401 (D. Mass. 1989), *aff'd*, 900 F.2d 464 (1st Cir.), *cert. den.*, 112 L. Ed. 2d 104 (1990). *See also Johnson v. Michigan State University*, 547 F. Supp. 429 (W.D. Mich. 1982), *aff'd without op.*, 723 F.2d 909 (6th Cir. 1983).

This standard reflects common sense. As a matter of logic, a comparison between Mechanical Engineering and Specialized Instructional Programs in the College of Education is like comparing apples and oranges. *Zahorik, supra*, 729 F.2d at 93. Moreover, under the specific facts of this case, Petitioner's comparison with Hale-Benson is also flawed because she was hired as *an Associate Professor* and sought tenure only during the same year Petitioner applied for promotion. Scholarship as demonstrated in her publications, which was the issue in Petitioner's case, was not the issue in her request for tenure because her scholarship had been established at the time she was hired as an Associate Professor. The concerns about Hale-Benson involved her teaching. Thus the comparison sought by Petitioner not only addressed completely different academic disciplines but also necessitated a comparison of two different components of academic endeavors: teaching ability and demonstrated scholarship. The courts below, thus, correctly rejected Hale-Benson as a proper comparable.

Petitioner's comparison to Akinmusuru was similarly flawed even though he was hired in the same college where Petitioner taught. Akinmusuru was hired as a Visiting Associate Professor of Civil Engineering in academic year 1988-89 and he became an Associate Professor *without tenure* the following academic year, with a tenure date of January 15, *1992.* Akinmusuru had an impressive professional record at the time he was hired as a Visiting Associate Professor and his teaching experience was more extensive than Petitioner's. Moreover, Akinmusuru did not apply for a position at the University until *after* Petitioner's request for promotion had been denied. He had been interviewed for a vacancy in the Department of Civil Engineering which was initially offered to *another*

candidate, a *white* male who declined the position. By comparing a hire case to a promotion case, Petitioner again compared apples and oranges. Since, to this date, Akinmusuru remains untenured, there is no logic to the claim that Akinmusuru has obtained more than Petitioner sought. Thus, he was properly rejected as an appropriate comparable by the courts below.

Contrary to Petitioner's contentions, the instant case is not subject to the "suspect category" or "strict scrutiny" analysis set forth by this Court in *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469, 102 L. Ed. 2d 854, 109 S. Ct. 706 (1989), and *Wygant v. Jackson Board of Education*, 476 U.S. 267, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986). Throughout these proceedings, Petitioner has consistently refused to acknowledge that equal protection claims are subject to two different types of test, depending upon the nature of the state law at issue. Laws which, overtly or covertly, employ racial or ethnic classifications (facially discriminatory laws) are subject to the "strict scrutiny" test and can be justified only if they further a compelling governmental purpose and no less restrictive alternative is available. *See e.g., Regents of the University of California v. Bakke*, 438 U.S. 265, 57 L. Ed. 2d 750, 98 S. Ct. 2733 (1978); *Fullilove v. Klutznick*, 448 U.S. 448, 65 L. Ed. 2d 902, 100 S. Ct. 2758 (1980); *Wygant, supra;* and *City of Richmond, supra.* This test clearly applies to racial classifications such as "quotas", "set asides" and numerical "preferences", which are not at issue in this lawsuit. *Bakke, supra; Fullilove, supra; Wygant, supra;* and *City of Richmond, supra.*

If, on the other hand, as it is the case herein, a law is neutral, *i.e.*, not race-based, the test is whether actions taken under the law are the result of invidious, purposeful discrimination on the basis of race. *Village of*

Arlington Heights, supra; and *Washington v. Davis,* 426 U.S. 229, 48 L. Ed. 2d 597, 96 S. Ct. 2040 (1976). In the public employment discrimination context, an employee who claims he has been discriminated against on the basis of race because a neutral law has not been applied without regard to race, *i.e.,* disparate treatment, is subject to the same standard and burden of proof as a Title VII disparate treatment plaintiff. *Gutzwiller v. Fenik,* 860 F.2d 1317, 1325 (6th Cir. 1988); *Kitchen v. Chippewa Valley Schools,* 825 F.2d 1004, 1011 (6th Cir. 1987); *Daniels v. Board of Education,* 805 F.2d 203, 207 (6th Cir. 1986); and *Grano v. Dept. of Development,* 637 F.2d 1073, 1081-82 (6th Cir. 1980). *See also Scott v. University of Delaware,* 601 F.2d 76, 80-81 (3rd Cir.), *cert. den.,* 444 U.S. 931 (1979); and *Lee v. Conecuh County Board of Education,* 634 F.2d 959 (5th Cir. 1981), *reh. den.,* 640 F.2d 385. This is the precise test employed by the courts below.

Petitioner's failure to adduce any evidence to establish that the fact that he is a white male made the difference in the decision not to promote him cannot be overcome by claiming that this case is subject to the "strict scrutiny" test. Neither the facts nor the prior decisions of this Court support Petitioner's claims.

Respondents emphasize that the decision to deny Petitioner's request for promotion and tenure was based on his academic qualifications and not on an affirmative action program. As correctly found by the trial Court, Petitioner merely relied on the fact that the University is required to comply with Executive Order 11246 to contend that mere compliance with that Order was *per se* evidence of race discrimination against the white majority (R. 71: Memorandum of Opinion at 16). Petitioner offered no evidence that he was denied tenure

because of the University's compliance with Executive Order 11246 (*Id.*). To suggest that compliance with the law of the land is indicia of race discrimination against the majority is, simply put, preposterous. The suggestion proffered by Petitioner of some sinister, dark plot to unlawfully discriminate against white males is nowhere supported by the record. Such suggestion does not even amount to a scintilla of circumstantial evidence and is insufficient to create an issue for consideration by this Court.

III. The Court Below Correctly Held That A University Professor Cannot Maintain A Claim For The Alleged Deprivation Of His Equal Protection Rights In The Denial Of Promotion With Tenure When The Alleged Deprivation Is Not Premised On Racial, Ethnic Or Other Class Animus But On A Qualitative Consideration Of Academic Scholarship.

The third question presented for review by Petitioner is a typical "I-am-just-as-good-as-you-are" claim presented by a university professor who cannot accept the academic judgment of his academic peers. Since federal Courts have consistently and appropriately rejected the notion that a mere academic dispute should raise to the level of a constitutional claim and this Court has consistently deferred to academicians in purely academic matters, Petitioner's attempt to create a new constitutional claim has no merit.

The trial Court in this case found that Petitioner's claim that the Respondents did not apply the same standards in evaluating him and other individuals for reasons "other than race" was "not justiciable under the equal protection clause because it does not involve class-based discrimination" (R. 71: Memorandum of Opinion at 18). The trial Court correctly held that to hold otherwise would convert federal courts into a super-tenure review committee (R. 71: Memorandum of Opinion at 18). The Sixth Circuit Court agreed.

Such conclusions are consistent with several courts of appeals decisions which, in the specific area of academic tenure, have found challenges under the equal protection clause nonjusticiable unless the plaintiff alleges discrimination based on race, sex, or the exercise of a constitutional right. *See e.g., Wells v. Doland*, 711 F.2d 670, 675 (5th Cir. 1983) (mathematical perfection in

tenure decisions is not required when the academic distinctions burden neither a suspect class nor a fundamental interest); *Faro, supra,* 502 F.2d at 1232 ("The computer, highly developed though it be, is not yet qualified to digest the punch cards of an entire faculty and advise the waiting and expectant onlookers of its decision as to hiring and promotion"); and *Clark, supra,* (denial of a faculty promotion based on an evaluation of a faculty member's scholarly achievements is exactly the type of determination which is not justiciable in federal court in an action under civil rights statutes).

Petitioner's case precisely illustrates the reasons why Courts give considerable latitude to academic decisions in tenure cases. Petitioner has chosen to pursue "applied research" instead of the "fundamental (theoretical) research" traditionally accepted as "the academic research". While the Dean of the College and others at the departmental level were receptive to the acceptance of this type of research for academic tenure, the majority of those involved in the peer evaluation at the university-wide level were not. The Provost and the UPC had reservations about the nature and quality of Petitioner's research. They were also hesitant to credit confidential research not open for review by academics. The peer review system involves value judgments and academic considerations at various levels of the institution. While supported by some, Petitioner failed to convince a large number of tenured faculty that he should be admitted to tenured status. In a pluralistic university academic disagreement cannot be avoided. The Equal Protection Clause does not forbid it.

Before the trial Court, Petitioner argued that his claim for alleged discrimination for reasons "other than race" was based on this Court's decisions in *Yick Wo v.*

Hopkins, 118 U.S. 356, 30 L. Ed. 220, 6 S. Ct. 1064 (1886), and *Snowden v. Hughes*, 321 U.S. 1, 88 L. Ed. 2d 497, 64 S. Ct. 397 (1944). In *Yick Wo* the City and County of San Francisco had passed an ordinance prohibiting the operation of 310 laundries housed in wooden buildings, but allowing such laundries to resume operations if the operator secured a permit from the government. Most of these businesses were owned by Chinese individuals. Upon application to resume operation, all but one of about 80 white applicants obtained permits, but none of over the 200 Chinese applicants were successful. This Court ruled that although the ordinance was "fair on its face and impartial in appearance", the fact that it was "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights" constituted a denial of the constitutional right to equal protection of the laws. 118 U.S. at 373-374. This Court found that the administration of the ordinance was "directed so exclusively against a particular class of persons as to warrant and require the conclusion" that "no reason for it exists except hostility to the race and nationality to which the petitioners belong". *Id.* at 373, 374. The discrimination was, therefore, illegal. *Id.* at 374.

In *Snowden*, a candidate at a primary election for state office alleged that the State Primary Canvassing Board, acting in violation of state law, had failed to correctly certify him as one of the Republican nominees, depriving him of nomination and election as representative in the state assembly. The candidate disclaimed any contention that class or racial discrimination was involved. This Court held:

"Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection *unless there is shown to be present in it an element of intentional or purposeful discrimination.* This may appear on the face of the action taken with respect to a particular class or person, cf. *McFarland v. American Sugar Co.*, 241 U.S. 79, 86-7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo v. Hopkins*, 118 U.S. 356, 373-4. But a discriminatory purpose *is not presumed, Tarrance v. Florida*, 188 U.S. 519, 520; *there must be a showing of 'clear and intentional discrimination.' Gundling v. Chicago*, 177 U.S. 183, 186; see *Ah Sin v. Wittman*, 198 U.S. 500, 507-8; *Bailey v. Alabama*, 219 U.S. 219, 231." 321 U.S. at 8 (Emphasis added).

In *Snowden*, this Court gave race and unequal taxation as examples of invidious and purposeful proscribed discrimination. The Court warned that "a construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored". 321 U.S. at 11-12.

Following this precedent, in *Charles v. Baesler*, 910 F.2d 1349, 1356-1357 (6th Cir. 1990), a case involving a promotion in a fire department, the Sixth Circuit held that in order to establish a constitutional violation under *Yick Wo, supra*, the plaintiff must show that the government "administered the contractual promotion system with a discriminatory intent or purpose". A mere showing that government officials incorrectly applied state/municipal law is not enough. Invidious discriminatory intention must be proven. *Id.* at 1357. As stated by the Sixth Circuit:

> "In short, Charles' equal protection claim boils down to the assertion that 'he was treated one way and everyone else another,' which 'has never been thought to raise an equal protection claim.' *Wagner v. Higgins*, 754 F.2d 186, 194 (6th Cir. 1985) (Contie, J., concurring). Charles may be correct in arguing that the government and its officials in fact singled him out due to their sloppy administration of the contractual promotion system and their misapplication of state and local law. Such negligence is a far cry, however, from intentional invidious discrimination. *Beck v. Washington*, 369 U.S. 541, 554-55, 82 S.Ct. 955, 962-63, 8 L.Ed.2d 98 (1962); *Snowden v. Hughes*, 321 U.S. 1, 7-9, 64 S.Ct. 397, 400-01, 88 L.Ed. 497 (1944)." *Id.* at 1357.

Since the record below is silent as to "the other reason" why he was "invidiously discriminated" against, the courts below properly rejected Petitioner's claims.

In pursuing his non-class discrimination claims, Petitioner did not explain why other faculty were allegedly "favored" by the Respondents, but merely suggested a mathematical tabulation of their academic credentials. Such tabulation is completely inappropriate and is the type of determination which courts have consistently declined to make. *Clark, supra*, 607 F.2d at

639 fn. 10. *See also, Bishop v. Wood,* 426 U.S. 341, 349-350, 48 L. Ed. 2d 684, 96 S. Ct. 2074 (1976); and *Regents of the University of Michigan v. Ewing,* 474 U.S. 214, 225-226, 88 L. Ed. 2d 523, 106 S. Ct. 507 (1985) (federal courts not suited "to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions").

As stated at the outset, this case does not involve novel legal theories nor a complex factual background. This case concerns a faculty promotion decision upon which reasonable people could and did disagree. Disagreement does not constitute, in and of itself, evidence of unlawful discrimination. By failing to come forward with specific probative evidence of invidious discrimination by each of the twenty-eight Respondents, Petitioner failed to establish that there was a genuine issue of a material fact precluding summary judgment in favor of Respondents on this issue. The Court of Appeals properly rejected his "I-am-better-than-you are claim".

Clearly, the third question presented for review by Petitioner does not present a significant issue for review by this Court.

CONCLUSION

For all the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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